

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DONALD F. BENOIT, Derivatively on
Behalf of MBNA CORP. and on Behalf of
Himself and All Others Similarly Situation,

Plaintiff,

vs.

BRUCE L. HAMMONDS, *et al.*

Defendants,

--and--

BANK OF AMERICA CORPORATION, a
Delaware Corporation, AS SUCCESSOR IN
INTEREST TO MBNA CORP., and MBNA
CORP., a Maryland Corporation,

Nominal Defendants.

Civ. No. 07-CV-561

Additional Caption on Following Page

**DEFENDANTS' ANSWERING BRIEF IN RESPONSE TO
THE BENOIT GROUP'S MOTION TO BE APPOINTED LEAD
PLAINTIFF AND TO APPROVE THEIR DESIGNATION OF LEAD COUNSEL**

LEMON BAY PARTNERS, and MALCOLM
ROSENWALD,

Plaintiff,

--against--

BRUCE L. HAMMONDS, *et al.*

Defendants,

--and--

BANK OF AMERICA CORPORATION, AS
SUCCESSOR IN INTEREST TO MBNA
CORP., and MBNA CORP.,

Nominal Defendants.

Civ. No. 07-CV-562

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NATURE AND STAGE OF THE PROCEEDINGS

This motion relates to two complaints filed in September 2007: the Verified Shareholder's Class and Derivative Complaint filed by Donald Benoit and the Shareholders' Class and Derivative Complaint filed by Lemon Bay Partners and Malcolm Rosenwald. These complaints assert derivative claims on behalf of MBNA Corporation ("MBNA") and claims under the Securities Exchange Act of 1934 (the "Exchange Act") on behalf of a putative class of MBNA shareholders. The claims in both complaints are based on events in 2004 and 2005.

On December 10, 2007, plaintiffs Donald Benoit, Lemon Bay Partners and Malcolm Rosenwald (collectively, the "Benoit Group") filed the instant motion to consolidate their two complaints, appoint the Benoit Group as Lead Plaintiffs, and approve the designation of Robbins Umeda & Fink, LLP and Paskowitz & Associates as Co-Lead Counsel. Defendants MBNA, Bank of America Corporation, Bruce Hammonds, Kenneth Vecchione, Richard Struthers, John Cochran, III, Lance Weaver, Charles Krulak, Michael Rhodes, John Scheflen, Randolph Lerner and Kenneth Lewis oppose that motion and submit this answering brief.

SUMMARY OF ARGUMENT

The complaints that are the subject of this motion are not the only actions before this Court that seek to assert derivative claims on behalf of MBNA, as well as federal securities-law claims under the Exchange Act on behalf of a putative class of MBNA stockholders, based on events in 2004 and 2005. On November 21, 2005, these same plaintiffs represented by the same lawyers filed a different consolidated shareholder

derivative complaint in this Court asserting essentially the same derivative claims on behalf of MBNA. *In re MBNA Corporation Derivative and Class Litigation*, No. 05-327 (GMS) (the “2005 Derivative Action”). Moreover, this Court has already appointed a different Lead Plaintiff represented by different Lead Counsel to pursue securities claims under the Exchange Act on behalf of a putative class of MBNA shareholders based on a different consolidated complaint filed on December 12, 2005. *In re MBNA Corp. Securities Litigation*, No. 05-272 (GMS) (the “2005 Securities Action”). Because the derivative and class action claims asserted in these actions overlap substantially with those asserted in the 2005 Derivative Action and the 2005 Securities Action, granting the instant motion will result in a needless multiplicity of lawsuits and waste of this Court’s resources.

STATEMENT OF FACTS

Although these two actions were filed only recently, the derivative and securities law claims asserted were first presented to this Court in separate actions filed more than two years ago.

2005 Derivative Action. These same plaintiffs (represented by the same plaintiffs lawyers) initiated a derivative action in 2005 asserting the same state-law claims for breach of fiduciary duty against the same defendants based on the same alleged wrongful acts in 2004 and 2005 that are at issue in the pending lawsuits. The consolidation order entered in 2005 Derivative Action on August 25, 2005 expressly applies to each “action arising out of the same or substantially the same transactions or events as these cases that is subsequently filed in, removed to or transferred to this

Court.” (2005 Derivative Action D.I. 28.) On June 26, 2007, this Court dismissed the 2005 Derivative Action for lack of subject-matter jurisdiction. (2005 Derivative Action D.I. 75.) On July 11, 2007, plaintiffs filed a motion for reconsideration or reargument of that decision (2005 Derivative Action D.I. 76), which is fully briefed.

2005 Securities Action. Beginning in May 2005, numerous different plaintiffs brought class-action lawsuits alleging violations of the Exchange Act based on alleged misstatements and omissions by defendants in 2004 and 2005. On October 13, 2005, this Court appointed a Lead Plaintiff and designated Lead Counsel pursuant to 15 U.S.C. § 78u-4(a)(3)(B) to pursue these federal securities law claims on behalf of a putative class of MBNA shareholders. (*See* Order Consolidating Actions and Appointing Lead Plaintiff and Lead Counsel, dated October 13, 2005 (attached hereto as Exhibit A).) That Lead Plaintiff filed a consolidated class-action complaint on December 12, 2005. The parties in the 2005 Securities Action are in the middle of discovery, with a fact discovery cutoff date of February 29, 2008.

On September 18, 2007, plaintiffs filed these two separate actions in this Court, creating a parallel and duplicative track of litigation. Rather than waiting for the Court to rule on their pending motion for reconsideration in the 2005 Derivative Action, plaintiffs brought “new” lawsuits asserting derivative claims identical to those asserted in the 2005 Derivative Action. The new complaints also allege violations of the Exchange Act claims similar to those alleged in the 2005 Securities Action. In fact, “[t]he *full* allegations of the Securities Class Action Complaint” are “incorporated . . . by reference”

into the complaints in these actions. (*See* Benoit Complaint at p. 6 n.1; Lemon Bay Complaint at p. 7 n.1 (emphasis added).)

In addition, the putative class alleged in these new actions overlaps substantially with the putative class alleged in the 2005 Securities Action. The putative class in these actions consists of all MBNA shareholders whose MBNA shares were exchanged for Bank of America shares by reason of the Bank of America-MBNA merger, which closed on December 31, 2005. (Benoit Complaint ¶ 6; Lemon Bay Complaint ¶ 6.) The putative class in the 2005 Securities Action “consist[s] of all persons who purchased the publicly traded securities of MBNA between January 20, 2005 and April 20, 2005, inclusive.” (2005 Securities Action Complaint ¶ 23.) It is likely that a large percentage of MBNA shareholders who acquired their shares between January and April 2005 still held those shares at the end of 2005, exchanged those shares for Bank of America shares pursuant to the merger, and thus are members of both putative classes.

ARGUMENT

Plaintiffs’ motion to consolidate these actions and be appointed as Lead Plaintiffs should be denied or stayed for two reasons.

1. These complaints assert derivative claims that were already before this Court in the 2005 Derivative Action. Although the Court dismissed the 2005 Derivative Action on June 26, 2007 (2005 Derivative Action D.I. 75), plaintiffs elected to file a motion for reconsideration (2005 Derivative Action D.I. 76). That motion is fully briefed and still pending. Having moved for reconsideration, plaintiffs should have

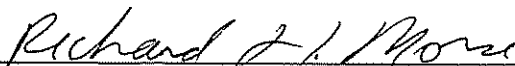
waited for a ruling on that motion before burdening the Court (and the defendants) by filing two new lawsuits asserting identical derivative claims. At the very least, plaintiffs' motion to consolidate these new complaints and be appointed Lead Plaintiffs should be stayed until the Court rules on plaintiffs' pending motion for reconsideration and the conclusion of any appeal that plaintiffs take from the dismissal of the 2005 Derivative Action.

2. This Court has already appointed a different Lead Plaintiff and different Lead Counsel to pursue claims under the Exchange Act on behalf of a putative class of MBNA shareholders. On October 13, 2005, this Court appointed Activest Investmentgesellschaft mbH as "Lead Plaintiff pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(ii)" to pursue alleged violations of the Exchange Act by MBNA and certain of its officers on behalf of a putative class of MBNA shareholders. (*See* Order Consolidating Actions and Appointing Lead Plaintiff and Lead Counsel, dated October 13, 2005.) In that same Order, this Court approved the appointment of different Lead Counsel pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v). There is no reason to appoint a different lead plaintiff and different lawyers to assert related claims under the same sections of the Exchange Act on behalf of a slightly different putative class based on largely the same underlying events. To rule otherwise would be to permit improper claim splitting by these plaintiffs and the class they seek to represent and would result in a needless duplication of actions before this Court.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied or at the very least stayed until the Court rules on plaintiffs' pending motion for reconsideration in the 2005 Derivative Action and the conclusion of any appeal in that other action.

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December 21, 2007

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

JAMES M. BAKER, On behalf of himself and all
others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS,
KENNETH A. VECCHIONE, RICHARD K.
STRUTHERS, CHARLES C. KRULAK, JOHN
R. COCHRAN, III, MICHAEL G. RHODES,
LANCE L. WEAVER, and JOHN W.
SCHEFLEN,

Defendants.

Case No. 1:05-cv-00272-GMS

CLASS ACTION

ROCHELLE PHILLIPS, On behalf of herself and
all others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS, and
KENNETH . VECCHIONE,

Defendants.

Case No. 1:05-cv-00277-GMS

CLASS ACTION

(Additional Captions Set Forth Below)

ROBERT WILKINS, Individually and on behalf
of all others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS,
KENNETH A. VECCHIONE, RICHARD K.
STRUTHERS, CHARLES C. KRULAK, JOHN
R. COCHRAN, III, MICHAEL G. RHODES,
LANCE L. WEAVER, and JOHN W.
SCHEFLEN,

Defendants.

Case No. 1:05-cv-00287-GMS

CLASS ACTION

LEONARD BRONSTEIN, On behalf of himself
and all others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS,
KENNETH A. VECCHIONE, RICHARD K.
STRUTHERS, CHARLES C. KRULAK, JOHN
R. COCHRAN, III, MICHAEL G. RHODES,
LANCE L. WEAVER, and JOHN W.
SCHEFLEN,

Defendants.

Case No. 1:05-cv-00289-GMS

CLASS ACTION

GREG PENN, On behalf of himself and all others
similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS,
KENNETH A. VECCHIONE, RICHARD K.
STRUTHERS, and LANCE L. WEAVER,

Defendants.

Case No. 1:05-cv-00293-GMS

CLASS ACTION

CLIFFORD W. JONES, On behalf of himself and
all others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS, and
KENNETH A. VECCHIONE,

Defendants.

Case No. 1:05-cv-00316-GMS

CLASS ACTION

MICHAEL D. BLUM, On behalf of himself and
all others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS,
KENNETH A. VECCHIONE, JOHN R.
COCRAN, III, RICHARD K. STRUTHERS, and
LANCE L. WEAVER

Defendants.

Case No. 1:05-cv-00372-GMS

CLASS ACTION

SCOTT KIMBALL, On behalf of himself and all
others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS,
KENNETH A. VECCHIONE, RICHARD K.
STRUTHERS, CHARLES C. KRULAK, JOHN
R. COCRAN, III, MICHAEL G. RHODES,
LANCE L. WEAVER and JOHN W. SCHEFLEN,

Defendants.

Case No. 1:05-cv-00643-GMS

CLASS ACTION

VIRGINIA MCMATH, On behalf of herself and
all others similarly situated,

Plaintiff,

vs.

MBNA CORP., BRUCE L. HAMMONDS,
KENNETH A. VECCHIONE, RICHARD K.
STRUTHERS, CHARLES C. KRULAK, JOHN
R. COCRAN, III, MICHAEL G. RHODES,
LANCE L. WEAVER and JOHN W. SCHEFLEN,

Defendants.

Case No. 1:05-cv-00644-GMS

CLASS ACTION

**ORDER CONSOLIDATING ACTIONS AND
APPOINTING LEAD PLAINTIFF AND LEAD COUNSEL**

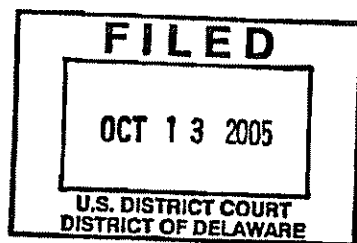
Having considered the motion of Activest Investmentgesellschaft mbH for account of the
PT-Master fund, ("Activest") and good cause appearing therefore, the Court orders as follows:

1. The Motion is GRANTED;
2. The above-captioned actions are consolidated pursuant to Fed. R. Civ. P. 42(a);
3. Activest is the "most adequate plaintiff" and accordingly, is appointed Lead Plaintiff pursuant to 15 U.S.C. 78u-4(a)(3)(B)(iii).
4. Milberg Weiss Bershad & Schulman LLP is appointed Lead Counsel pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

IT IS SO ORDERED.

DATED: Oct 13, 2005


United States District Court Judge



CERTIFICATE OF SERVICE

I, Richard H. Morse, hereby certify that on December 21, 2007, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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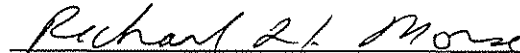
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